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No. 09-141

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

JULIE M. BENNETT,

Petitioner,

v.

VERIZON WIRELESS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether Petitioner has presented compelling reasons to grant the Petition, where the Second Circuit's Summary Order affirming the District Court's analysis of Petitioner's evidence did not require "pretext plus," but instead determined that Petitioner had failed to demonstrate a genuine issue of material fact regarding pretext, following this Court's decision in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000)?

2. Whether Petitioner has presented compelling reasons to grant the Petition, where she relies upon temporal proximity alone to establish pretext with respect to a retaliation claim?

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Cellco Partnership d/b/a Verizon Wireless is a Delaware general partnership, the partnership interests of which are indirectly owned by Verizon Communications, Inc. and Vodafone Group Plc, both of which are publicly traded corporations.

TABLE OF CONTENTS

	Page
Questions Presented	i
Corporate Disclosure Statement Pursuant to Supreme Court Rule 29.6	ii
Table of Contents	iii
Table of Cited Authorities	v
Opinions and Orders Below	1
Introduction	1
Statement of the Case	2
I. Verizon Wireless' Policies & Procedures	2
II. Cell Phone Account Access	4
III. Post-Termination Events	10
IV. Verizon Wireless' Motions for Summary Judgment and Reconsideration	10
Reasons for Denying the Petition	15
I. The Second Circuit Did Not Require "Pretext Plus" and Otherwise Properly Followed This Court's Decision in *Reeves v. Sanderson Plumbing Products, Inc.*	15

Contents

Page

II. There is Complete Agreement Among the Circuits that Temporal Proximity Alone is Insufficient to Establish Pretext for a Retaliation Claim 19

Conclusion 22

TABLE OF CITED AUTHORITIES

Page

Cases

Bennett v. Verizon Wireless,
2007 U.S. Dist. LEXIS 87522
(W.D.N.Y. Sept. 18, 2007) 1

Bennett v. Verizon Wireless,
2008 U.S. Dist. LEXIS 3373
(W.D.N.Y. Jan. 24, 2008) 1

Bennett v. Verizon Wireless,
326 Fed. Appx. 9, 2009 U.S. App. LEXIS 9566
(2nd Cir. May 1, 2009) 1

Cifra v. General Electric Co.,
252 F.3d 205 (2nd Cir. 2001) 20, 21

James v. New York Racing Assoc.,
233 F.3d 149 (2nd Cir. 2000) 17

McCoy v. Shreveport,
492 F.3d 551 (5th Cir. 2007) 21

Pastran v. K-Mart Corp.,
210 F.3d 1201 (10th Cir. 2000) 21

Reeves v. Sanderson Plumbing Products, Inc.,
530 U.S. 133 (2000) ..... *passim*

Simpson v. New York State Dept. of Civil Servs.,
166 Fed. Appx. 499, 2006 U.S. App. LEXIS 795
(2nd Cir. Jan. 9, 2006) 21

Cited Authorities

Page

Skrjanc v. Great Lakes Power Service,
272 F.3d 309 (6th Cir. 2001) 21

Slattery v. Swiss Reinsurance Am. Corp.,
248 F.3d 87 (2d Cir. 2001) 20

Sprenger v. Southern Fed. Home Loan Bank of Des Moines,
252 F.3d 1106 (8th Cir. 2001) 21

St. Mary's Honor Center v. Hicks,
509 U.S. 502 (1993) 15, 16, 18, 19

Strong v. Univ. Healthcare Sys.,
482 F.3d 802 (5th Cir. 2007) 21

Wascura v. City of S. Miami,
257 F.3d 1238 (11th Cir. 2001) 21

Wyninger v. New Venture Gear, Inc.,
361 F.3d 965 (7th Cir. 2004) 21

Rules

Supreme Court Rule 29.6 ii

Supreme Court Rule 10 ..... 1, 15

OPINIONS AND ORDERS BELOW

The U.S. District Court for the Western District of New York (Siragusa, J.) initially denied Respondent's motion for summary judgment. *See Bennett v. Verizon Wireless*, 2007 U.S. Dist. LEXIS 87522 (W.D.N.Y. Sept. 18, 2007). Upon reconsideration, however, the District Court granted summary judgment to Verizon Wireless. *See Bennett v. Verizon Wireless*, 2008 U.S. Dist. LEXIS 3373 (W.D.N.Y. Jan. 24, 2008). The U.S. Court of Appeals for the Second Circuit affirmed the District Court's judgment in a summary order. *See Bennett v. Verizon Wireless*, 326 Fed. Appx. 9, 2009 U.S. App. LEXIS 9566 (2nd Cir. May 1, 2009).

INTRODUCTION

Petitioner has presented no "compelling reasons" for her Petition for a Writ of Certiorari to be granted. *See* Sup. Ct. R. 10. Petitioner's suggestion that the Second Circuit applied the "pretext plus" standard rejected by this Court's decision in *Reeves v. Sanderson Plumbing Products, Inc.* is misplaced, as both the District Court and the Second Circuit in this case determined that Petitioner failed to demonstrate pretext itself and thus never reached the issue of whether she did (or needed to) present additional evidence to withstand Respondent's motion for summary judgment.

Petitioner also failed to demonstrate any Circuit split on the issue of whether temporal proximity between an employee's protected activity and termination, by itself, can establish pretext. Petitioner incorrectly asserts that the Second Circuit has determined that

temporal proximity alone is sufficient. The Second Circuit has not addressed that issue, but the Fifth, Sixth, Seventh, Eighth, Tenth, and Eleventh Circuits have all determined that temporal proximity alone cannot establish pretext.

Therefore, Petitioner wholly failed to carry her burden of demonstrating any compelling reasons for this Court to grant the Petition. Accordingly, the Petition should be denied.

STATEMENT OF THE CASE

Verizon Wireless, a wireless communications provider, employed Petitioner Julie Bennett ("Bennett") from July 1999 to November 2003, when her employment was terminated because Bennett violated Verizon Wireless' Code of Business Conduct. A: 10, 73.[1] Ms. Bennett was a Customer Service Supervisor at the time of her termination. A: 12, 74.

I. Verizon Wireless' Policies & Procedures

Many of Verizon Wireless' policies and procedures are contained in its Code of Business Conduct. A: 248-283. To reinforce the importance of these policies and to make sure they are known and understood by all employees, Code of Business Conduct training is provided periodically and reinforced through various means, including e-mails, e-training, company

[1] References are to the Joint Appendix ("A:") or the Special Appendix ("SPA:") filed with the U.S. Court of Appeals for the Second Circuit.

publications, brochures and postings in the workplace. A: 11, 75, 125, 200. Verizon Wireless' policies and procedures are also discussed in regularly held supervisor meetings. A: 76.

To ensure the privacy of customer communications and the integrity of Verizon Wireless employees, the Code of Business Conduct prohibits employees from accessing account information from their own accounts or those of family and friends:

> Our **legal** and Company requirements governing privacy require that you ***do not***:
>
> Access your personal wireless account information, or those of family or friends, without prior approval by your supervisor. Access includes, but is not limited to, issuing credits/adjustments, altering account information, or making payments or equipment changes.

See A: 270-271 (emphasis in original); *see also* A: 11, 101, 176-177, 190. Additionally, the Code of Business Conduct specifically requires that supervisors enforce its provisions and do nothing to condone or encourage violations:

> Violations of the law, Our Code, and other Company policies, procedures, instructions, practices and the like can lead to disciplinary action up to and including termination from employment. Such disciplinary action may also be taken against supervisors or executives

> who condone, permit or have knowledge of illegal, unethical or other improper conduct and do not take appropriate action.... No one, regardless of level or position, is ever authorized to direct an employee or a contractor to commit an illegal or improper act on Company premises, while working for Verizon Wireless or on behalf of Verizon Wireless.

A: 280-281; *see also* A: 195.

II. Cell Phone Account Access

On or about October 31, 2003, Mr. Darryl Hunt, Associate Director – Customer Service, advised Mr. Gulliford of questionable activities on Ms. Bennett's cellular account. On October 31, 2003, Mr. David Munoz, Ms. Bennett's fiancé and an authorized user on her consumer cellular account, called in to the Customer Service Call Center to complain about additional text messaging fees that he had incurred. Mr. Munoz was extremely upset during the call. As a result, Mr. Munoz's call was escalated. Both the representative who originally handled the call and the Lead Customer Service Representative to whom the call was escalated felt uncomfortable with Mr. Munoz's request for a credit on the bill. In addition, the Lead Representative that handled the escalation indicated that she felt that Mr. Munoz exerted pressure on her to apply credit to the account based on Mr. Munoz's relationship (fiancé) with Ms. Bennett and her position of authority at Verizon Wireless. After reviewing the credit request, the Company determined that a bill adjustment was not warranted. A: 16-17, 167-169, 172-173.

In attempting to resolve Mr. Munoz's concerns, Mr. Hunt discovered some questionable activity on the account. Specifically, several Verizon Wireless employees with whom Ms. Bennett worked closely had accessed and made changes to Ms. Bennett's account. Specifically, since May 2003, five of Ms. Bennett's direct reports – including Diana Moller – had accessed her account and performed various transactions. These transactions included credit card payments using her personal credit card, the initiation of a name change and an address change. A: 17, 335-347.

Ms. Bennett admits instructing employees on her team to make changes to her personal wireless account. A: 78, 97-99. Bennett also admits that it would be a violation of the Code of Business Conduct for those employees to have accessed her account if they did not have her permission to do so. A: 107. However, she believes that the changes being made to her account were "not significant enough" to warrant discipline. A: 108. Bennett did not obtain her supervisor's permission for access to her cell phone account. A: 238-247.

On Friday, November 14, 2003, Mr. Gulliford met with Ms. Bennett, at her request, to discuss a number of issues including Ms. Bennett's concerns with a particular employee on her team (Ms. Katrina McKay). In addition, and prior to the meeting, Mr. Gulliford had decided to speak with Ms. Bennett about the transaction activity found on her cellular account. A: 17.

Mr. Gulliford and Ms. Bennett spent quite some time discussing the issue concerning Ms. McKay. Ms. Bennett

was concerned that Ms. McKay was having a negative influence on the rest of the team by engaging in call avoidance behaviors. Ms. Bennett had already brought these concerns to Ms. Savino's attention, but disagreed with how Ms. Savino had handled the situation. After reviewing the specifics regarding Ms. McKay's call avoidance incidents, Ms. Savino had decided to send out a reminder to the entire team that these behaviors were not acceptable. Ms. Bennett disagreed with this approach and felt that Ms. McKay was being treated too leniently. A: 17.

When it came time to discuss the activity on Ms. Bennett's cellular account, Mr. Gulliford began by asking Ms. Bennett to share with him her understanding of the Company's position, as set forth in the Code of Business Conduct, regarding an employee accessing another employee's cellular account. According to Mr. Gulliford, Ms. Bennett replied that it was not acceptable for employees to do this and that these actions would be clear violations of the Code of Business Conduct. He then asked Ms. Bennett why several of her direct reports had accessed her cellular account numerous times and made changes on her account. Ms. Bennett began by stating that the account that had been accessed was a consumer account, not an employee account. When she recognized that she had just acknowledged that employees had accessed her account, Ms. Bennett stated that she would never ask anyone from her team to access her personal account, thereby jeopardizing their employment. A: 17-18, 118.

Ms. Bennett then stated that the only thing she asked the employees to do was apply payments using

her personal credit card. Mr. Gulliford advised Ms. Bennett that based upon the records obtained through the billing system, it was clear that one of her employees, Ms. Diana Moller, had completed an address change and initiated a name change. Mr. Gulliford expressed concern that Ms. Bennett would knowingly place her team members' jobs at risk by asking them to complete these transactions on her behalf. Ms. Bennett responded by saying that she would never do anything to put her employees in jeopardy. A: 18.

Mr. Gulliford also shared with Ms. Bennett the perception issue she had created by asking certain members of her team to work on her account and not others, particularly with other morale and favoritism issues on her team. *See* A: 177. In conclusion, he asked Ms. Bennett to consider the fact that one of the individuals (Ms. Moller) whom she asked to make changes to her account was a personal friend with whom she had recently traveled out of state. Mr. Gulliford reminded Ms. Bennett of the importance of keeping personal and work relationships separate to avoid conflicts. A: 18.

Just two days before, Mr. Gulliford had met with Diana Moller concerning a disciplinary issue – Moller had been given a Written Warning by Bennett for inappropriate e-mails and wanted him to reduce it to a verbal warning – and Moller had raised with Mr. Gulliford that she was concerned about an alleged rumor in the workplace. Moller stated that she had heard from co-worker Amy Evans that co-worker Katrina McKay had been spreading a rumor about an alleged intimate relationship between Bennett and

Moller, including that they had traveled to Canada together. Apparently, Ms. Bennett and Ms. Moller had gone to North Carolina together, but not Canada. A: 19, 90-91, 108, 134-136, 146-148.

Given Ms. Moller's concern about this rumor, Mr. Gulliford informed human resources that evening (November 12, 2003) that the issue had been raised. A: 137-138, 153-155, 187. However, Ms. Moller resigned on November 14, 2003 before any investigation could begin, other than Mr. Gulliford's conversation with Ms. Bennett on that date, which is discussed below. A: 19, 157-159.

At the end of their conversation with Ms. Bennett on November 14, Mr. Gulliford and Ms. Bennett briefly discussed the alleged relationship between Ms. Bennett and Ms. Moller. Ms. Bennett did not appear to take the issue very seriously and, in fact, seemed to find the topic somewhat amusing. Ms. Bennett informed Mr. Gulliford that the rumors regarding a relationship between the two had been circulating since July, that Mr. Munoz, Ms. Bennett's fiancé, was also aware of the rumors, and that they had both just laughed about it. A: 19, 140, 151, 159-160, 184, 188.

After his own sexuality – Mr. Gulliford is a gay man – was brought up by Bennett's counsel during his deposition, Mr. Gulliford testified that he believes that he is more sensitive to issues such as rumors about sexuality in the workplace, but that Bennett did not complain about the alleged rumor and expressed no concern about it. A: 126, 129.

Bennett admits that she did not complain to Mr. Gulliford regarding alleged harassment in the workplace. A: 118-119; *see also* A: 153, 157-159, 166, 180. Although Bennett claims she complained to her direct supervisor Pat Savino about the rumor concerning her relationship with Diana Moller, she has no documentation of any of those meetings/conversations (A: 117); her own timeline (A: 303-306) does not document any such conversations; and she lost her calendar that might note when such conversations occurred. A: 116. Mr. Gulliford very clearly expressed to Ms. Bennett that he was concerned that such rumors were circulating, but that it might be difficult to ascertain the source since the information was coming second and third hand. Mr. Gulliford nevertheless informed Ms. Bennett that he would further investigate the matter. He also impressed upon Ms. Bennett the importance of abiding by the Company's policies, including the Company's policy on relationships at work. A: 19.

After reviewing the information that had been obtained through the company's billing system and from discussions with Ms. Bennett, Verizon Wireless determined that Ms. Bennett's employment should be terminated for violations of the Code of Business Conduct, specifically her instructing her employees to access and complete transactions on her cellular account. Verizon Wireless' policies are clear on employees either accessing their own accounts or directing others with whom they work to access their accounts. Both such actions are prohibited and the Company routinely terminates the employment of individuals who engage in either sort of activity. Ms. Bennett was terminated effective November 20, 2003. A: 20, 161-164, 179, 237, 246-247.

Bennett admits that she has no idea why Verizon Wireless was looking into her account status. A: 114-115. In any event, the information regarding Ms. Bennett's cellular account both came to light ***before*** Mr. Gulliford's conversation with Bennett on November 14, 2003, when they first discussed the alleged rumor. A: 15-17, 21.

The same documentation that led to Bennett's termination (A: 335-347) revealed that Lucy Munoz, another Verizon Wireless employee and the sister of David Munoz, had swapped out an upgraded phone on the account for reasons of "customer satisfaction." Ms. Munoz, who had not complained about any alleged discrimination and/or harassment in the workplace, also lost her employment for inappropriately accessing the account of a family member (Mr. Munoz was using Ms. Bennett's account). A: 20.

III. Post-Termination Events

On or about December 26, 2003, Ms. Bennett filed an EEOC Charge. A: 21, 348-350. On April 30, 2004, the EEOC issued a Determination Letter and Notice of Right to Sue. The EEOC determined that Verizon Wireless had shown a legitimate, non-retaliatory reason for terminating Ms. Bennett. A: 21, 351-354.

IV. Verizon Wireless' Motions for Summary Judgment and Reconsideration

On July 17, 2006, Verizon Wireless filed a Motion for Summary Judgment. On September 19, 2007, the District Court issued a Decision and Order denying

Verizon Wireless' Motion for Summary Judgment. A. 1237-1252. In its Decision and Order, the District Court first determined that Bennett met her *de minimis* burden to demonstrate a *prima facie* case of retaliation. A: 1244-1250. Notably, the only evidence of a causal connection between Bennett's alleged protected activity and her termination from employment was the close temporal proximity between the two events. A: 1247-1250.

The Court then determined that Verizon Wireless met its burden to articulate a legitimate, non-discriminatory reason for Bennett's termination from employment. In particular, the undisputed facts showed that Bennett "instructed her own subordinates to access her account in order to alter account information and to make payments on the account using Bennett's credit card without permission from Bennett's supervisor," leading the Court to find that "Bennett's decision to instruct her subordinates to engage in activity on her behalf which would otherwise be a direct violation of the Code if she engaged in the activity herself is a sufficiently legitimate, non-discriminatory reason for her termination." A: 1251.

With respect to the pretext analysis, the Court found a genuine issue of material fact based on the affidavit of Lucy Couvertier (formerly Lucy Munoz), a former Verizon Wireless employee. A: 1251-1252. Ms. Couvertier's affidavit states that she was terminated for making changes to a family member's account with no prior permission from her supervisor. A: 1156. In fact, it is undisputed that Ms. Couvertier, an employee in a Verizon Wireless store located in Buffalo who had not

engaged in protected activity, was terminated for violating the same policy that Bennett violated. That policy prohibited Verizon Wireless employees from accessing their own cellular accounts or those of family and friends. Couvertier had swapped out one phone for another on Ms. Bennett's personal cellular phone account, which was being used by Bennett's fiancé, David Munoz, who was Lucy Munoz's brother. A: 20.

Ms. Couvertier further alleged that she "routinely made changes to not only my family and friends' accounts with the prior approval of my supervisor, but to the accounts of my supervisor's family and friends' accounts, all with prior approval by that same supervisor, and that this was common practice." A: 1156. Ms. Couvertier, at most, alleged that a single, unnamed supervisor engaged in similar conduct to Bennett's without repercussion. Her conclusion that this was "common practice" without any foundation is at best inadmissible hearsay. But, the Court relied on this statement to find that genuine issues of material fact exist with respect to pretext. Focusing on the Couvertier Affidavit, the Court stated:

> ***If*** supervisors in a similar position to Bennett regularly gave permission to their subordinates to access the accounts of the supervisor's friends and family, and ***if*** these particular supervisors did not have permission to do so from their own supervisor, and ***if*** such activity went undisciplined, such a fact could help prove that Verizon's stated reason for termination was pretextual.

A: 1251-1252 (emphasis supplied). The problem with this statement was that Bennett did not present evidence to show: (1) that any supervisor other than the unnamed supervisor mentioned by Couvertier gave a subordinate permission to access the supervisor's cellular account or that of a family member or friend; (2) that Couvertier's supervisor in the Buffalo Walden Avenue store was similarly situated to Bennett in the Rochester call center; (3) that Couvertier's supervisor did not have permission from his/her supervisor to allow access to his/her cellular account or that of a family member or friend; and (4) that the conduct of Couvertier's supervisor was known to the decision makers in the Bennett case (or any other supervisor for that matter), and that the known activity went undisciplined.

In fact, the only evidence in the record on that latter issue was the following sworn statement by Mr. Gulliford:

> While I was Director of the Verizon Wireless Call Center in Rochester, New York, I did not become aware of any other circumstance where a supervisor allowed or instructed one of her subordinates to access and/or make changes to that supervisor's account. If I had been aware of any such activity, it would be investigated as a violation of the Code of Business Conduct, and appropriate disciplinary action would be taken if such activity were substantiated.

A: 20. Bennett presented no evidence of any kind to contradict this statement, as the Couvertier Affidavit does not address the knowledge issue at all.

Based on the foregoing, Verizon Wireless moved for reconsideration, arguing that the Couvertier Affidavit did not provide evidence that would support the conclusion that Verizon Wireless' legitimate, non-discriminatory reason for terminating Bennett was a pretext for retaliation.

The District Court granted Verizon Wireless' Motion for Reconsideration and granted summary judgment to Verizon Wireless. SPA: 1-22. First, the District Court agreed that the Couvertier Affidavit "does not support Bennett's argument that a similarly-situated employee was treated more favorably." SPA: 6. Having concluded that the Couvertier Affidavit did not create a genuine issue of material fact regarding pretext, Judge Siragusa then went on to discuss in detail numerous other allegations Bennett put forth as purported evidence of pretext. SPA: 6-21. Judge Siragusa concluded that Bennett's proffered evidence of pretext failed to create a genuine issue of material fact and therefore that Verizon Wireless was entitled to judgment as a matter of law. SPA: 21-22. Judgment was entered for Verizon Wireless (SPA: 23).

On appeal, the U.S. Court of Appeals for the Second Circuit affirmed the District Court in a Summary Order. Citing *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000), the Second Circuit agreed that Bennett failed to demonstrate a genuine issue of material fact regarding pretext.

REASONS FOR DENYING THE PETITION

The decisions below do not conflict with a decision of this Court or any Court of Appeals, nor do they implicate a federal question that has not been decided by this Court. Accordingly, Petitioner has not carried her burden of demonstrating any "compelling reasons" for the Petition to be granted. *See* Sup. Ct. R. 10.

I. The Second Circuit Did Not Require "Pretext Plus" and Otherwise Properly Followed This Court's Decision in *Reeves v. Sanderson Plumbing Products, Inc.*

Bennett claims that the District Court and the Second Circuit applied a "pretext plus" requirement that was rejected by this Court in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000). Pet., pp. 33-34. Petitioner mischaracterizes both *Reeves* and the decisions below.

In *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993), this Court determined that a fact finder's rejection of an employer's legitimate, non-discriminatory reason for its action did not compel judgment for a plaintiff. *Id.* at 511. Rather, the falsity of the employer's explanation for its action could lead to an inference that the employer intentionally discriminated or retaliated against a plaintiff, but not necessarily in all cases. *Id.* at 511 ("Thus, rejection of the defendant's proffered reasons will *permit* the trier of fact to infer the ultimate fact of intentional discrimination.") (emphasis in original). The plaintiff still bears the ultimate burden to prove that intentional

discrimination or retaliation occurred, notwithstanding the falsity of the employer's explanation. *Id.* at 519 ("[I]t is not enough . . . to *dis*believe the employer; the fact finder must *believe* the plaintiff's explanation of intentional discrimination.") (emphasis in original).

In *Reeves*, the issue before this Court was whether the plaintiff's *prima facie* case was enough to satisfy his/her ultimate burden of proving discrimination once he/she had demonstrated that the employer was not being truthful about its actions. The Fifth Circuit in *Reeves* had concluded that a plaintiff was always required to show more than the falsity of the employer's explanation – *i.e.*, "pretext plus" – and could not rely simply on the evidence used to demonstrate the *prima facie* case in order to sustain his/her ultimate burden of proof.

This Court in *Reeves* rejected the notion of "pretext plus" and determined that "a plaintiff's *prima facie* case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated." *Id.* at 148. However, consistent with *St. Mary's Honor Center*, this Court did not state that such evidence would always suffice, thus not precluding judgment as a matter of law for employers in all cases where the employer's proffered explanation has been shown to be false:

> Thus, a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated.

> This is not to say that such a showing by the plaintiff will *always* be adequate [for judgment as a matter of law]. . . . For instance, an employer would be entitled to judgment as a matter of law if the record conclusively revealed some other, nondiscriminatory reason for the employer's decision, or if the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination had occurred. . . .
>
> Whether judgment as a matter of law is appropriate in any particular case will depend on a number of factors. Those include the strength of the plaintiff's prima facie case, the probative value of the proof that the employer's explanation is false, and any other evidence that supports the employer's case and that properly may be considered on a motion for judgment as a matter of law.

Id. at 148-149 (emphasis in original; citations omitted).

Petitioner suggests that the Second Circuit still applies the "pretext plus" standard after *Reeves*. Pet., pp. 33-35. The Second Circuit disagrees. *See James v. New York Racing Assoc.*, 233 F.3d 149 (2nd Cir. 2000) (finding *Reeves* "wholly compatible and harmonious" with Second Circuit precedent). Petitioner's argument is likely the result of her apparent fundamental misunderstanding of the decisions below. The courts below determined that Petitioner had failed to

demonstrate a genuine issue of material fact regarding pretext itself, *i.e.*, whether Verizon Wireless' reason for terminating Petitioner was false. Thus, whether something more was required to withstand a motion for summary judgment was never an issue.

The District Court rejected Petitioner's assertion that temporal proximity alone was enough to establish pretext and addressed all fifteen alleged indicia of pretext. Pet., App. B, pp. 11a-31a. The District Court concluded that "there is an insufficient basis for a trier of fact to doubt the persuasiveness of the [sic] Verizon's proffered evidence and ultimately to find that the reasons offered by them [sic] for Bennett's dismissal were pretextual." Pet., App. B., p. 13a.

Similarly, the Second Circuit concluded that Petitioner failed to satisfy her burden of showing "that the employer's action against her was taken in retaliation for her complaints. . . . On the evidence submitted, a finder of fact could not have reasonably found that the employer's stated reasons were pretext and that the employer was in fact motivated by retaliation." Pet., App. A, p. 3a (citing *Reeves*).

These determinations are perfectly consistent with *St. Mary's Honor Center* and *Reeves*. Both of those cases involved the implications of demonstrating that an employer's explanation for its actions was false. *St. Mary's Honor Center* held that demonstrating the falsity of the employer's explanation did not require judgment as a matter of law for the plaintiff while *Reeves* held that it could support judgment for the plaintiff in some cases, but did not preclude judgment as a matter of law for the defendant.

Here, the District Court and the Second Circuit both determined that Petitioner had failed to create a genuine issue of material fact as to the alleged falsity of Respondent's explanation for Petitioner's dismissal. Having not even passed that hurdle, Petitioner's reliance on *Reeves* is misplaced and there is no basis to suggest that the Second Circuit does not follow *Reeves* generally or did not follow *Reeves* in this case.

II. There is Complete Agreement Among the Circuits that Temporal Proximity Alone is Insufficient to Establish Pretext for a Retaliation Claim

Given the District Court's and Second Circuit's rejection of her proffered evidence of pretext, Petitioner not surprisingly argues that temporal proximity alone is sufficient to establish a genuine issue of material fact regarding pretext, and suggests that there is a Circuit split in this regard. Pet., pp. 34-35. There is no Circuit split on this point, and for good reason.

While temporal proximity may establish causation for purposes of the *prima facie* case, it does not create a genuine issue of material fact concerning whether the employer's reason for its actions is false. Importantly, any inference or presumption created by the *prima facie* case "simply drops out of the picture" once a defendant articulates a legitimate, non-discriminatory reason for its actions. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 511 (1993). Additionally, this Court emphasized that the *prima facie* case may be sufficient to withstand judgment as a matter of law in some circumstances, but only when "combined with sufficient evidence to find that the employer's asserted justification is false."

Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 146 (2000). The temporal proximity of protected activity and termination does nothing to cast doubt on the employer's articulated legitimate, non-discriminatory reason for that termination. If a plaintiff is unable to create an issue of fact as to the truthfulness of that articulated reason, then the fact that the termination occurred close in time to the protected activity has no bearing on the pretext analysis.[2]

In her effort to manufacture a Circuit split on the temporal proximity issue, Petitioner mischaracterizes the Second Circuit's decision in *Cifra v. General Electric Co.*, 252 F.3d 205 (2nd Cir. 2001). In that case, the Second Circuit determined that twenty (20) days between the plaintiff's protected activity and her termination was sufficient to satisfy the causal connection component of her *prima facie* case of retaliation. *Id.* at 217. However, the Second Circuit then went on to discuss *additional* evidence regarding the employer's explanation for its

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[2] Here, the temporal proximity argument has even less appeal. The issues that led to Petitioner's termination first came to Respondent's attention two weeks ***before*** the alleged protected activity. A: 16-17, 335-347. Accordingly, an inference of retaliation cannot be made. *See Slattery v. Swiss Reinsurance Am. Corp.*, 248 F.3d 87, 95 (2d Cir. 2001) ("where timing is the only basis for a claim of retaliation, and gradual adverse job actions began well before the plaintiff had ever engaged in any protected activity, an inference of retaliation does not arise"). The District Court noted this when rejecting Bennett's argument about temporal proximity. Pet., App. B, p. 11a-12a ("[H]ere the evidence supporting Verizon's non-retaliatory reason for discharging Bennett was generated before Bennett complained to Gulliford and is not disputed by Bennett.").

actions, ultimately concluding that there was a genuine issue of material fact regarding that explanation, and therefore no basis for summary judgment to the employer. *Id.* at 217-218. Thus, *Cifra* hardly stands for the proposition that temporal proximity alone can demonstrate pretext. Indeed, the Second Circuit has not yet established any precedent in that regard, but has ruled in another case that temporal proximity alone is not enough for pretext. *See* Pet., App. B, p. 12a (District Court citation to summary order in *Simpson v. New York State Dept. of Civil Servs.*, 166 Fed. Appx. 499, 2006 U.S. App. LEXIS 795 (2nd Cir. Jan. 9, 2006)).

However, the Circuits that have ruled on this question all determined that temporal proximity alone does not establish pretext. *See McCoy v. Shreveport*, 492 F.3d 551, 562 (5th Cir. 2007); *Strong v. Univ. Healthcare Sys.*, 482 F.3d 802, 808 (5th Cir. 2007); *Wyninger v. New Venture Gear, Inc.*, 361 F.3d 965, 981 (7th Cir. 2004); *Wascura v. City of S. Miami*, 257 F.3d 1238, 1247 (11th Cir. 2001); *Skrjanc v. Great Lakes Power Service*, 272 F.3d 309 (6th Cir. 2001); *Sprenger v. Southern Fed. Home Loan Bank of Des Moines*, 252 F.3d 1106, 1114 (8th Cir. 2001); *Pastran v. K-Mart Corp.*, 210 F.3d 1201, 1206 (10th Cir. 2000).

Based on the foregoing, there is no Circuit split on the issue of temporal proximity and pretext and therefore no compelling reason for this Court to consider that issue.

CONCLUSION

Verizon Wireless respectfully requests that the Court deny the Petition for a Writ of *Certiorari*.

Respectfully submitted,

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